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No. 86-104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE BOARD OF AIRPORT COMMISSIONERS OF THE CITY OF LOS ANGELES, et al.,
Petitioners,

v.

JEWS FOR JESUS, INC. AND ALAN HOWARD SNYDER, a/k/a AVI SNYDER,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principles of religious liberty. The objectives and purposes of the organization include promoting the concept of the constitutional principle of the free exercise of religion and

opposing any encroachment by governmental agencies which would limit or tend to inhibit such exercise and other areas of concern which interfere with the full experience of religious freedom.

The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in an official capacity, and some on a lay basis, but all recognize the importance of preserving and promoting the right to engage in evangelistic dissemination of religious beliefs as a part of the free exercise of religion.

SUMMARY OF ARGUMENT

First Amendment rights have always been accorded the highest protection by the Constitution and this Court. Governmental restrictions on free speech have been upheld only when justified by a compelling state interest that was advanced by the means least restrictive of First Amendment freedoms. The Court's analysis has always weighed the government's interests against First Amendment values.

In order to put the government's interests and the rights of individuals in proper balance, this Court developed public forum analysis. Public forum analysis allowed the Court to put in perspective both the government's interests and the burden on First Amendment rights by characterizing the location in which the governmental restriction operated.

Public forum doctrine was not intended to replace the compelling state interest/least restrictive means test. But that is what happens under the City's theory. Under the City's theory, First Amendment rights could be exercised only in areas designated by the government.

Regardless of the characterization given to the Central Terminal Area of Los Angeles International Airport under public forum analysis, the City ordinance must be justified by a compelling state interest, and it must use the least restrictive means to accomplish that interest. The City has not met this burden. Proper use of public forum analysis only helps to evaluate the government's interest. It does not replace the need to balance that interest against First Amendment values.

ARGUMENT

I. THE DESIGNATION OF THE CENTRAL TERMINAL AREA OF LOS ANGELES INTERNATIONAL AIRPORT AS A NONPUBLIC FORUM DOES NOT DETERMINE THE OUTCOME OF THIS CASE.

A. Government Restrictions On Free Speech Must be Justified By A Compelling State Interest Regardless Of The Type of Forum Involved.

This Case comes before the Court with the issues framed in a posture that poses great danger to fundamental First Amendment freedoms. While recognizing freedom of speech cannot be absolute, this Court has set very high standards that the government must meet in order to justify any burden on free speech.

> To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amend-

> ment freedoms is no greater than is essential to the furtherance of that interest.

United States v. *O'Brien*, 391 U.S. 367, 376-377 (1968) (footnotes omitted). The two-step compelling state interest/least restrictive means analysis has been the touchstone of First Amendment jurisprudence. The first part of this analysis has involved a weighing of the governmental interests advanced by the challenged restriction.

In the last ten to fifteen years, the Court has developed the public forum doctrine to help in this analysis. The public forum doctrine analyzes the geographic location in which the government restriction on free expression operates.

The theory behind the doctrine is that government restriction of free speech is more likely to be justified by a compelling interest in certain locations than in others. Restrictions that operate on public property that have not traditionally been the site for public discourse are more likely to be justified. These places are termed nonpublic forums. Thus, restrictions on free speech have been upheld in prisons, *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), military bases, *Greer* v. *Spock*, 424 U.S. 828 (1976), schools, *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), and the federal workplace, *Cornelius* v. *NAACP Legal Defense and Education Fund*, 105 S.Ct. 3439 (1985).

On the other hand, restrictions on free speech are less likely to be justified in places such as streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," *Hague* v. *CIO*,

307 U.S. 496, 515 (1939). These places are denominated public forums.

Public forum analysis can be a useful tool in weighing governmental interests asserted to justify restrictions on First Amendment rights. However, as this Court has recognized, "[a] certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop," *Lemon* v. *Kurtzman*, 403 U.S. 602, 624 (1971). The public forum analysis put forward by the City of Los Angeles in this case is an example of a constitutional theory that has become a runaway train. But beneath the painfully obvious perversion of the theory by the City lies a more subtle problem that must be dealt with to set the theory back on the right tracks again.

B. The City Has Improperly Used Public Forum Analysis To Avoid Balancing First Amendment Values Against Other Governmental Interests.

Instead of being used to help place a value on the governmental interest that is asserted to justify the government's restriction on free speech, public forum analysis has begun to take the place of the compelling state interest/least restrictive means test in some cases. When this is done, fundamental First Amendment values are not given sufficient consideration. Instead, the right to free speech is made to depend on the characterization given to the site of its exercise. With such an analysis the strong protection historically given to First Amendment rights becomes available only at certain places. The result is the thinking the Board of Airport Commissioners had expressly stated in the subject ordinance that it may ban First Amendment activities completely without further thought or justification once it is determined that the

Central Terminal Area of Los Angeles International Airport is not a public forum.

The grave danger of such thinking can be seen in the result of public forum analysis thus far. Only public streets and parks have been universally recognized as traditional public forums in this Court's decisions:

> In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. *Perry Education Association, supra*, at 45 and 46, n. 7, 74 L.Ed.2d 794, 103 S.Ct. 948. Of course, the Government "is not required to indefinitely retain the open character of the facility." *Id.*, at 47, 74 L.Ed.2d 794, 103 S.Ct. 948.
>
> The Government does not create a public forum by an action or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse. *Ibid.*

Cornelius v. *NAACP Legal Defense and Education Fund*, 105 S.Ct. 3439 (1985).

Under the City's theory, except in those few places recognized as traditional public forums, the exercise of free speech on public property becomes dependent on the government's decision on whether or not it will open or keep open that property to such expression. The First Amendment, designed as a restriction on the power of government, thus comes into play only at the discretion of that government. The fox is guarding the chicken coop.

This result is a perversion of First Amendment principles. "Under our Constitution, free speech is not a right given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly

exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." *Tinker* v. *Des Moines School District*, 393 U.S. 503, 513 (1969).

Public forum analysis, properly used, helps to put into perspective both the government interest that is asserted as a justification for a restriction on free speech and the extent of the burden such a restriction places on free speech. But this is not to say that even in non-public forums the government's interests do not have to be balanced with First Amendment values. In *Tinker*, the fact that the government regulation only restricted free speech inside a public high school, not a public forum, did not prevent it from running afoul of the Constitution.

II. THE CITY'S RESTRICTION ON FREE SPEECH DOES NOT ADVANCE A COMPELLING STATE INTEREST.

The City has not met its burden of proving that the extensive restriction on First Amendment freedoms contained in its ordinance is justified by a compelling state interest. It has not even attempted to meet this burden because of its assertion that the ordinance operates in a non-public forum and, therefore, no such justification is needed. The City does not contemplate any weighing of First Amendment values. Apparently the City believes that public forum analysis requires no more of it than a determination that the Central Terminal Area of the Los Angeles International Airport will not be open to free expression. This is not the case.

No matter what label is given to the airport terminal after public forum analysis, the City's restrictions on free speech are not justified. Ignoring the obvious over-

breadth and vagueness infirmities of the ordinance[1] and viewing the ordinance as a ban on leafleting, apparently how it was meant to be and was applied[2], the ordinance advances no state interest.

The City claims that the airport is dedicated solely to safe air travel and aiding the traveling public. It is assumed that under proper constitutional analysis this could be a claim that the government has a compelling interest in providing for safe and efficient air travel which is advanced by the ordinance. That the government has such a compelling interest is not disputed.

The conclusions that such a recognized interest is advanced by the ordinance is clearly wrong. The City has stipulated that the respondents' activities were not impeding or interfering with the use of the airport by passengers. The stipulation amounts to a recognition of the fact that the safe and efficient operation of the airport is in no way incompatible with the exercise of the respondents' First Amendment rights. Therefore, the government's interest is not advanced by the ordinance. Any possible interference with the dedicated purpose of the airport could be eliminated with less restrictive time, place, and manner regulations.

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[1] The mind reels at trying to determine what is a "First Amendment activity" and therefore prohibited in the terminal: reading?; praying?; political discussion?

[2] It does not appear from the stipulation that the City has banned the selling of newspapers in the airport terminal, surely an activity protected by the First Amendment.

CONCLUSION

The compelling state interest/least restrictive alternative free exercise test, as announed in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and consistently followed by this Court in its progeny should be applied here. Therefore, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted

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